(19)

JAN 9 1942

CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 825.

IN THE MATTER

of

THE REORGANIZATION OF THE ELEVENTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY.

BRIEF FOR RESPONDENT, THE ELEVENTH WARD BUILDING & LOAN ASSOCIATION OF NEWARK, N. J., IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*.

HALSEY W. STICKEL,
Attorney for Respondent, Eleventh Ward Building & Loan Association of Newark, N. J.
1180 Raymond Boulevard,
Newark, New Jersey.

FRED G. STICKEL, JR.,
Of Counsel.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark, N. J.

INDEX.

	PAGE
STATEMENT OF THE CASE	1
QUESTIONS TO BE CONSIDERED	3
ARGUMENT	4
Summary of Arguments	4
Point A. The petitioners were given the hearing prescribed by the state statute, actively and without objection participated therein and cannot now complain	5
Nor were the petitioners prevented from introducing evidence material to the issues	7
Nor were petitioners denied the opportunity to cross examine witnesses	8
Point B. The Plan of Reorganization in providing for the crediting of book value to borrowing members to be credited on their bond and mortgage, does not violate the Fourteenth Amendment	8
The claim of unconstitutional preference here made was disposed of on a non-federal ground in the Court of Errors and Appeals	11
CONCLUSION	12

CASES CITED.

	PAGE
American Railway Express Company v. *Kentucky*, 273 U. S. 269	7
Arrowsmith v. *Harmoning Admrx.*, 118 U. S. 194	7
Bell Telephone Co. of Penn. v. *Pennsylvania Public Utility Commissioner*, 309 U. S. 30	7
Bucsi v. *Longworth Building & Loan Association*, 119 N. J. L. 120	1
Campbell v. *Allegheny Corporation*, (C. C. A. 4th, 1935), 75 Fed. (2d) 947; writ of *certiorari* denied, 296 U. S. 581	10
Chapman, Etc., Land Co. v. *Bigelow*, 206 U. S. 41	7
Corstvet v. *Bank of Deerfield*, 263 N. W. 687	10
Day v. *Palisade Building & Loan Association*, 124 N. J. Eq. 1	10
Doty v. *Love*, 295 U. S. 64	9, 12
Felts v. *Murphy*, 201 U. S. 123	6
Franklin v. *South Carolina*, 218 U. S. 161	7
Gibbes v. *Zimmerman*, 290 U. S. 326	10
Home Building & Loan Association v. *Blaisdell*, 290 U. S. 398	10
Hurwitz v. *North*, 271 U. S. 40	6
Louisville & Nashville R. R. Co. v. *Schmidt*, 177 U. S. 230	11
Lynch v. *People of N. Y. ex rel Pierson*, 293 U. S. 52	11
Mutual Life Insurance Co. v. *McGrew*, 188 U. S. 291	4, 8
Newman v. *Asbury Park & Ocean Grove Bank*, 120 N. J. L. 122	10
Pierce v. *Somerset Railway*, 171 U. S. 641	6
State v. *Title Guaranty & Trust Co.*, 177 Atl. 617, 99 A. L. R. 1205	10

PAGE

Timmons v. *Security Savings Bank of Marshalltown*, 221 Iowa 102, 264 N. W. 708, 299 U. S. 503, rehearing denied 299 U. S. 621 10
Twining v. *State of New Jersey*, 211 U. S. 78 6

Veix v. *Sixth Ward Building & Loan Association*, 123 N. J. L. 356 ..... 1, 10
Veix v. *Sixth Ward Building & Loan Association*, 310 U. S. 32 ..... 1, 10

Watson v. *Maryland*, 218 U. S. 173 7
West v. *Louisiana*, 194 U. S. 258 7
Western Union Telegraph Co. v. *Wilson*, 213 U. S. 52 7

---

99 Amer. Law Rep. 1220 9

UNITED STATES CONSTITUTION.

Fourteenth Amendment 11

STATUTES.

New Jersey R. S. 17:12-106 2
Rule 38 of Supreme Court 3, 10

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 825.

IN THE MATTER

of

THE REORGANIZATION OF THE ELEVENTH WARD BUILDING AND LOAN ASSOCIATION OF NEWARK, NEW JERSEY.

BRIEF FOR RESPONDENT, THE ELEVENTH WARD BUILDING & LOAN ASSOCIATION OF NEWARK, N. J., IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*.

I.

Statement of the Case.

The impact of the depression upon the building and loan associations of New Jersey, recognized or referred to in *Bucsi* vs. *Longworth Building & Loan Association*, 119 N. J. L. 120; *Veix* vs. *Sixth Ward Building & Loan Association*, 123 N. J. L. 356 and in *Veix* vs. *Sixth Ward Building & Loan Association*, 310 U. S. 32 at page 37, resulted in the creation of the plan of reorganization involved in this proceeding (R. pp. 36, 37, Par. 2).

It was devised by the Commissioner of Banking and Insurance of New Jersey, the New Jersey Building and Loan League, Federal Savings and Loan Insurance Corporation,

Federal Home Loan Bank of New York and the Reconstruction Finance Corporation, and at the time the Eleventh Ward Building & Loan Association management adopted it to solve its condition, had been successfully applied to many similar associations and approximately $31,000,000 made available to shareholders of New Jersey (R. pp. 37, 38 and 39, Par. 3, 4, 5, 6 and 7; pp. 43 and 44, Par. 5; pp. 155 and 156).

The plan is fully described in paragraph 6-12 inclusive on pages 44-47 of the Record, to which reference is respectfully prayed. Also paragraphs 3-5 inclusive on pages 37-39 of Record and pages 70-111.

The Reorganization Act of 1937 was the first and essential step taken to enable such plan to be applied to the New Jersey Associations (R. pp. 38 and 39, Par. 4 and 5).

The plan having been worked out with the above agencies was submitted to the Commissioner of Banking and Insurance who approved it and authorized its submission to the members of the Association (R. pp. 113 and 114, Testimony, R. pp. 224, ll. 39 and 40; p. 225, ll. 1-12; p. 230, ll. 30-40; p. 231, ll. 1-9).

The membership of the Association was 4717 with shareholdings of $8,488,182.21 (R. p. 47, Par. 13, ll. 23-27).

On June 18, 1940, 75 members of the Association with shareholdings of $258,937.18, 1.59% of the total number of shareholders and 3.05% of the total share liability (R. p. 47), elected to take advantage of one method given by the Reorganization Act with respect to a plan submitted thereunder, to wit, the dissent remedy (See R. S. 17:12-106.) (R. p. 20).

On June 24, 1940, the special meeting of the Association shareholders was held and the plan approved by the shareholders (See opinion of Vice-Chancellor Bigelow, R. p. 128, ll. 1-11).

On the 31st day of October, 1940, the Court of Chancery, with certain modifications in detail, approved the plan of reorganization as fair and equitable. (R. p. 253.)

On September 19, 1941, the decree of the Court of Chancery was affirmed by the Court of Errors and Appeals and the Remittitur and Decree of Affirmance filed October 3, 1941. (R. p. 275.)

II.

Questions to Be Considered.

Rule 38 of this Court provides that:

> "Only the questions specifically brought forward by the petition for writ of certiorari will be considered."

The petition under Section B is apparently petitioner's compliance with this rule.

However, although the question there raised is whether the petitioners "were afforded a hearing within the meaning of the Fourteenth Amendment," the brief in support of the petition in paragraph 3a page 7, apparently relies upon the rejection by the Court of certain proffered proof as indicating not that they did not have a hearing but that they did not get that "full" hearing which petitioners conceive they should have had. Nevertheless, in Point A of the

Argument, page 9 of the Brief, petitioners state that they propose to claim that there was "no hearing", that they were prevented from introducing material evidence and that they were "given no opportunity to cross examine witnesses".

As we interpret the position of the petitioners, it is that they did not get the kind of a hearing which they now consider they should have been afforded. And on that basis, while we do not think it falls within the question presented in B 1a, page 4 of petitioner's brief, we shall proceed with our argument. The petition does not indicate specifically the section of the Fourteenth Amendment alleged to have been violated. We assume counsel relies upon the due process section. The particular right, privilege or immunity should have been set up. *Mutual Life Insurance Co.* vs. *McGrew*, 188 U. S. 291.

ARGUMENT.

Summary of Arguments.

POINT A. The Court of Chancery discharged its duty to "hear and dispose" "summarily", as required by the statute, those issues properly raised by the petitioners; the petitioners actively and without objection participated therein and took the benefits thereof, including the exercise of the right of cross examination, while the proferred evidence was not arbitrarily refused but rejected as inadmissible because immaterial, not founded upon a specific dissent, waived, or too late. No federal question is involved in the action of the New Jersey Courts.

POINT B. The claim that the petitioners were deprived of their property without due process of law because borrowing members of the Association are alleged to have been preferred over the petitioners, is not now available to them because not founded upon a dissent as required by the statute; it was, nevertheless, disposed of but on a non-federal ground; and in any event, the federal question sought to be reveiwed is not substantial.

POINT A.

The petitioners were given the hearing prescribed by the state statute, actively and without objection participated therein and cannot now complain.

A full hearing was afforded petitioners. The determination of the Court was based upon the pleadings and upon affidavits filed as well as upon the proofs submitted. Witnesses were called and examined both on direct and cross.

On July 24, 1940, pursuant to order to take proofs and without objection on the part of the petitioners, testimony was taken not *ex parte* and not only as to proof sought by the Association (as alleged in petitioner's brief, p. 3, ll. 10 and 11) but in the presence of counsel for the petitioners who exercised his right of cross examination, and who brought about the introduction through stipulation and exhibit of desired proof (R. pp. 186, 187, Exhibit S-4 p. 194, Exhibit S-3, pp. 192, 193 and p. 182, pp. 157-186).

On July 29, 1940, upon the continuance of the hearing, counsel for the petitioners announced that "In lieu of

further proofs in this case counsel desire to put in this stipulation." (R. p. 187.) This stipulation contains facts desired to be established by the petitioners (R., p. 194).

And again counsel for petitioners, on July 29, 1940, far from objecting to procedure stated "There is only one open item," and counsel for the Association promptly offered to supply the desired evidence (R. p. 187).

Upon this record including the said testimony, (R. p. 197, ll. 33 and 34) the Court, on September 23, 1940, made its final decision as to the said plan (R. p. 197).

Thereafter on October 24, 1940, petitioners presented a petition for a continuance and other relief (R. p. 250), which continuance and relief was denied by the Court (R., last paragraph of decree, p. 255).

The petitioners registered no objection to the method of hearing and considering the issues, nor did they claim that the petitioners had been denied the right to cross examine or seek the ruling of the Court on objections to the admission or rejection of testimony.

We submit that the petitioners were not deprived of a hearing or trial, that the Court properly discharged its statutory duty to "hear and dispose," "summarily" of the issues specifically raised by the dissent filed, that no federal question is here involved and no constitutional right of the petitioners was violated. *Hurwitz* vs. *North*, 271 U. S. 40 at page 42 and cases there cited; also *Felts* vs. *Murphy*, 201 U. S. 123; *Twining* vs. *State of New Jersey*, 211 U. S. 78 at page 110; *Pierce* vs. *Somerset Railway*, 171 U. S. 641 at page 648.

Nor were the petitioners prevented from introducing evidence material to the issues.

The interpretation of a State statute and questions of State procedure are determinable by the State Courts and the United States Supreme Court governed thereby. *West vs. Louisiana,* 194 U. S. 258; *Watson* vs. *Maryland,* 218 U. S. 173.

The New Jersey Court of Errors and Appeals construing the statutory remedy of dissent conferred by the Reorganization Act said that specification and particularization were of the essence of the statutory scheme. R. 259, first paragraph.

The Court did not arbitrarily refuse to take testimony but ruled on the admissibility of evidence, purely a matter of state practice and procedure. The rejection of the proferred evidence was based upon either immateriality, lack of a specific dissent as required by the statutory scheme, waiver, failure to register an adequate objection, or untimeliness of proffer. (R. p. 258, ll. 12-28; 259, ll. 26-40; 261, ll. 1-19; p. 270, ll. 29-38; 270, ll. 15-20; 269; ll. 7-10; 266, ll. 30-35.) All involve questions not here reviewable. *Arrowsmith* vs. *Harmoning Admrx.,* 118 U. S. 194, at pages 195 and 196; *American Railway Express Company* vs. *Kentucky,* 273 U. S. 269, 273; *Bell Telephone Co. of Penn.* vs. *Pennsylvania Public Utility Commissioner,* 309 U. S. 30; *Western Union Telegraph Co.* vs. *Wilson,* 213 U. S. 52, 54; *Chapman, Etc. Land Co.* vs. *Bigelow,* 206 U. S. 41, 45; *Franklin* vs. *South Carolina,* 218 U. S. 161.

Nor were petitioners denied the opportunity to cross examine witnesses.

They in fact were given that right and exercised it as hereinbefore demonstrated.

They at no time in the Court below or by way of a proper ground of appeal raised that question nor was it argued before or passed upon by the Court of Errors and Appeals. *Mutual Life Insurance Co.* vs. *McGrew, supra.*

The constitutional rights of the petitioners were carefully respected by the Courts of New Jersey.

POINT B.

The Plan of Reorganization in providing for the crediting of book value to borrowing members to be credited on their bond and mortgage, does not violate the Fourteenth Amendment.

Paragraphs a and c are the portions of the plan specifically involved in the claim. (See R. pp. 76 and 77.)

The constitution and by-laws of the Association authorized the directors to allow such a credit, (R. p. 191), and all but 28 of the Association's mortgages had, prior to the presentation of the plan of reorganization been recast to allow such a credit. The mortgages so recast into "straight reduction" mortgages amounted to $1,848,645.61, and the mortgages that would be recast as the result of the plan amounted to $127,500.00, secured by shares having a present value of $62,459.51. (R. pp. 180-183, Ex. S-3, pp. 192, 193.)

The reasons for such crediting, the essentiality thereof if reorganization is to take place and the aid of the federal agencies secured and the alternative for the Association if such aid is not secured is set forth in the record. (R. Par. 2, pp. 48 and 49; Par. 6 and 7, pp. 51 and 52; Par. 8, p. 40; R. pp. 160, 161, 162, 163, ll. 39 and 40, 164 ll. 1-23.)

Were the borrowing members to be given a credit of but 45% the extent to which the petitioners would be affected would be $1,052.27, a cheap price indeed for the compensating benefits of the plan. (R. pp. 182 and 183.)

Here is not a preference but rather the agreement by the Association to grant a credit to 28 borrowing members such as the Association could have granted anyway and did grant to many other borrowing members as the result of which three million is made available to the petitioners and their fellow saving members, plus share insurance and a reorganized association able to serve the community.

Here is a mere recognition of the dual relationship of the member borrower to the Association and an equitable adjustment of both relationships in the common good.

The situation falls squarely within the reasoning, principles and decision in the case of *Doty* vs. *Love*, 295 U. S. 64, 69, 71, 72, 74, where a preference to the holders of small claims was upheld as was a release of shareholders from personal liability. See also 99 Amer. Law. Rep. 1220 for a number of cases where closed banks were reorganized under plans assented to by depositors representing seventy-five per cent of all debts, exclusive of depositors of less than twenty-five dollars, and at page 1226 and 1227 for cases involving plans approved despite preferential payments to small depositors.

Matters like this lie in sound judgment and not in the realm of the constitutional. *State* vs. *Title Guaranty & Trust Co.*, 177 Atl. 617, at pages 623, paragraph 11; 99 A. L. R. 1205.

We are dealing here as this Court said in *Veix* vs. *Sixth Ward Building & Loan Association, supra,* "With financial institutions of major importance to the credit system of the State;" and the Reorganization Act like the statute under review in the *Veix* case, "was one of a long series regulating the many integrated phases of the building and loan business such as formation, membership, powers, investments, reports, liquidations, foreign associations and examinations," page 37 of *Veix* case.

The law as applied by our New Jersey Courts was in complete harmony with the principles of that legal landmark, *Home Building and Loan Association* vs. *Blaisdell,* 290 U. S. 398, and of *Veix* vs. *Sixth Ward Building & Loan Association, supra; Gibbes* vs. *Zimmerman,* 290 U. S. 326, 332, and *Campbell* vs. *Allegheny Corporation* (C. C. A. 4th 1935), 75 Fed. (2d) 947 at page 954. (Writ of *Certiorari* denied in 1935, 296 U. S. 581). See also *Timmons* vs. *Security Savings Bank of Marshalltown,* 221 Iowa, 102, 264 N. W. 708; 299 U. S. 503, rehearing denied 299 U. S. 621; *Newman* vs. *Asbury Park & Ocean Grove Bank,* 120 N. J. L. 122, which lays down the formulae for reorganization of financial institutions in New Jersey; *Day* vs. *Palisade Building & Loan Association,* 124 N. J. Eq. 1, a decision upholding the constitutionality of statute and plan here involved; *Corstvet* vs. *Bank of Deerfield,* 263 N. W. 687. The constitutional question, if it exists at all, is not substantial in character under the circumstances present. Rule 38, Paragraph 5a.

The claim of unconstitutional preference here made was disposed of on a non-federal ground in the Court of Errors and Appeals.

There petitioners contended that "a blanket provision for granting such credits, without regard to necessity, affects only private rights and is not essential to fulfillment of a public purpose," and therefore violated the Fourteenth Amendment (R. p. 263, ll. 7-11).

But the Court found that "The rehabilitation of associations so circumstanced" (frozen and unable to function as the Association in question was) "indubitably serves the common good and welfare" (R. p. 264, ll. 12-14), that "Continued function is of the essence of the statutory scheme" (R. p. 264, ll. 36-37), and that "*the need for 'direct reduction' was found; and the finding is factually well grounded*" (R. p. 265, ll. 14-16). (Italics ours.) Such a finding of fact is not subject to re-examination by this Court. *Louisville & Nashville R. R. Co.* vs. *Schmidt*, 177 U. S. 230, 237. *Lynch* vs. *People of N. Y. ex rel Pierson*, 293 U. S. 52. Moreover, no dissent supported this objection in the Court below as required by statute.

Paragraph 2a of the dissent (R. p. 23) objects to the provision in question but not as violative of the Fourteenth Amendment. The objection obviously is designed to show that the plan is inequitable and unfair, not that it is unconstitutional. This is insufficient specification as the Act was construed by the Court of Errors and Appeals.

The dissent which raises the constitutional question is Paragraph 4 (R. p. 26), and the question there raised is not here in question.

To grant the prayer of petitioners would as a practical matter confer upon them that vested right in a method of liquidation, the existence of which this Court has emphatically denied. *Doty* vs. *Love, supra.*

It is respectfully submited that a writ of *certiorari* should not be granted.

Respectfully submitted,

HALSEY W. STICKEL,
Attorney for Respondent,
Eleventh Ward Building & Loan
Association of Newark, N. J.

FRED G. STICKEL, JR.,
Of Counsel.